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No. 06-

IN THE

Supreme Court of the United States

S. EMANUEL LIN, d/b/a
APTUS COMPANY

Petitioner,

v.

THE UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CORRECTED
PETITION FOR WRIT OF CERTIORARI

S. EMANUEL LIN, *Pro Se*
3527 Woodvalley Drive
Houston, Texas 77025-4232
(713) 666-3816

QUESTIONS PRESENTED

Our Government failed to furnish approximately $1.42 million worth of equipment for solo Petitioner Mr. Lin to install on the date it default-terminated his entire $1,225,110.00 contract. For his 565 days of performance, almost 24/7 at job site, Mr. Lin was paid a total of $56,497. For those undelivered GFE, Mr. Lin paid $175,000 back to Government for its increased installation cost by a 246-employee completion contractor tendered by a de-listed surety. The said contractor installed no equipment of any kind for the first 571 days of its contract while its contract price rose from original $1,350,000 for a 13 months completion to $2,172,081.65 on the 40th month and continuing. The Questions presented are:

Whether the denial of Mr. Lin's claim for monetary compensation under Contract Disputes Act of 1978, 41 U. S. C. §§ 601~613, was so cruel, unequal and detached in law and the principles of engineering and contracting to contravene the Due Process Clause of the Fifth Amendment?

Whether those portions of contract for which GFE was not delivered at all as of the date of termination or otherwise had been prevented from proceeding to its completion per requirement of the contract can be terminated under FAR 52.249-10 *Default*?

How do we measure progress or recognize a delay in a non-brick-and-mortar contract and what is the extent of a firm-fixed-price contractor's obligation to making what kind of progress while both parties are waiting for a new contract completion date to be re-established?

Whether Government had carried its burden of proof in an un-cited 25-minute solo direct testimony by a non-Contracting Officer who did not know a 120VAC electric circuit at the power plant?

Whether the court, sitting without jury, technical know-how or involvement in the 565-day contract, can decline to "litigate" Petitioner's claims while writing what Government did not or could not testify as truth for cross examination in its 25-minute of case in chief into an opinion with strong negative inference on Mr. Lin that even the favored completion contractor did not perform better?

Whether Government can "assign and transfer" to a delisted surety Mr. Lin's contract equity under an invalidated performance bond?

Whether Government can try a non-Contracting Officer's claims of incompetent jurisdiction to prejudice Petitioner's cause of action?

Whether default termination can stand on "a lone surviving reason among the initial 100" while the same multi-vendor contract survived on Petitioner's performance?

LIST OF PARTIES

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner herein and Plaintiff-Appellant in the United States Court of Appeals for the Federal Circuit below is Mr. S. EMANUEL LIN, doing business as APTUS COMPANY.

The Respondent here and Defendant-Appellee in the court below is the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner S. Emanuel Lin, a proprietary electrical contractor, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit affirming Government's denial of his claim for monetary compensation under Contract Disputes Act of 1978, 41 U. S. C. §§ 601~613 following a termination of his contract for default.

OPINIONS BELOW

The order of the United States Court of Appeals for the Federal Circuit in Appendix on page 18 ("App. 18") is unreported. The opinion of the United States Court of Federal Claims at App. 23 is reported at 61 Fed. Cl. 638.

JURISDICTION

The Federal Circuit entered its judgment on August 4, 2005. On Monday September 19, 2005, Petitioner filed a petition for panel rehearing, which was denied on October 11, 2005. App. 22. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Federal Circuit was invoked under 28 U.S.C. § 1295(a)(3). The jurisdiction of the Court of Federal Claims was invoked under Contract Dispute Act of 1978, specifically 41 U.S.C. §609 (a) (1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The case also involves following Federal Acquisition Regulations:

FAR 52.211-10 *Commencement, Prosecution and Completion of Work*,
FAR 52.243-4 *Changes*,
FAR 52.245-2 *Government Property*,
FAR 52.245-4 *Government-Furnished Property*,
FAR 52.249-10 *Default*,

STATEMENT

In 1998, Government procured certain equipment to modernize a half-century old hydro power plant at a total cost of $2,043,159.00. App. 198~120. It then awarded Mr. Lin on November 5, 1998 a contract to provide necessary retrofit and installation of these government-furnished equipment (GFE) at $1,265,110. The.

For March 3, 2000 completion, App. 96, "Government furnished property . . . will be available no earlier than as follows: GOVERNOR Equipment (October 1998), EXCITATION Equipment (January 1999), SCADA System (July 1999)." App. 179.

Upon notice to proceed on December 9, 1998, Mr. Lin promptly visited and ultimately relocated to the job site on February 14, 1999 to prepare for the initial installation of governor and exciter equipment. App. 104, 105.

But governor and exciter equipment with "[s]upplier's detailed assembly and foundation drawings", App. 87, and other installation manuals and wiring diagrams, did not arrive in full until late August 1999.

"[I]n view of the necessity to compensate for the late availability of Government furnished governor and excitation equipment", on November 24, 1999, both parties "understood and agreed that . . . the time for performance of all work under clause 00800-1 is EXTENDED 150 calendar days". App. 96. The "clause 00800-1" refers to paragraph "1 [FAR]

52.211-10 *Commencement, Prosecution and Completion of Work*" in section 00800 of the contract. App. 79.

Liquidated damage clause required "[w]ork activities shall be planned and scheduled so that all work, installation, wiring, auxiliary devices, operational testing, and repair of malfunctioning equipment does not cause any one of the five generators to be out of service for a total of twenty-one (21) calendar days." App. 85.

The "repair of malfunctioning equipment", GFE or Mr. Lin's, won't be easy if we put them together all at once; the symptom exhibited thereafter does not have clearly indication of its source(s) due to sophisticated interaction among them.

In response, Mr. Lin, an experienced computer system integrator in instrumentation and process control, submitted such an installation plan on the 25th day of the contract with his justification as follows, App. 104:

> "I believe altering only one major component of a generator at a time would help us isolate and identify the problem more easily when thing doesn't go as we have expected."

Government on December 2, 1999 ultimately approved such plan. App. 113. It would first proceed the GFE installation to a stage that it could be finalized in one week of generator outage for each type of GFE. App. 105.

The installation of the GFE began on January 6, 2000, App. 115 with Mr. Gary Horner working on site half-time as mechanical engineer for the first two weeks, joined by Mr. Juriy Dubinin as full-time electromechanical engineer and two youngsters as helpers. App. 117.

After completed the placement of all exciter equipment, the construction moved to install governor equipment. However, on February 24, 2000, Mr. Lin and Mr. Dubinun, discovered and reported in writing, App. 133, substantial defects

in the design and manufacturing of governor parts that needed to be assembled first to proceed further.

The contract provides "[t]he Contractor will not be held responsible for manufacturing errors or errors in the manufacturing errors or errors in the manufacturer's drawings." App. 87.

In his February 24, 2000 daily construction quality control (CQC) report, App. 133, Mr. Lin also advised the Government that the defects would "sever[e]ly delay the completion of the project". This was a dramatic change to his assessment made a day early as noted in Government's conversation record that "[h]e believes that the dates in his latest proposed schedule are still achievable." App. 131. pp2.

Responding to the said CQC report, governor manufacturer's field engineers arrived at the job site to investigate and removed several of them off site for corrective action. App. 135, 147. Mr. Meier, one of the engineers, "observed that Aptus is inexperienced. However, he did not express urgent, specific problems or deficiencies." App. 13[illegible] pp2.

As of the date of default termination on June 26, 2000, substantial amount of governor parts remained off-site, as the same set of defects applied to all five generators. Government did not know the state of their repair. App. 142, 146.

The exciter installation could not proceed due to the need to tear apart a functioning generator. The destruction was irreversible.

The SCADA equipment was not delivered until May 7, 2002, almost two years after Mr. Lin's default termination, App. 180. An experienced SCADA designer and constructor, Mr. Lin already said on February 23, 2000: "he is reluctant to discuss dates until he has touched the SCADA equipment." App. 132, pp 11. Without functioning SCADA, Mr. Lin's